No. 17-459

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF FORMER BIA CHAIRMAN AND IMMIGRATION JUDGE PAUL WICKHAM SCHMIDT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, to trigger the stop-time rule by serving a "notice to appear under section 1229(a)," the government must "specify" the items listed in 8 U.S.C. § 1229(a)'s definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

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INTEREST OF *AMICUS CURIAE*[*]

Amicus Judge Paul Wickham Schmidt served for eight years as a Member of the Board of Immigration Appeals—six of them as Chairman—and served as an Immigration Judge for an additional 13 years, from April of 2003 until June of 2016. In his 21 years in the immigration court system, he adjudicated tens of thousands of cases at the trial and appellate level, and became intimately familiar with the procedures, practices, and on-the-ground realities of the U.S. Immigration Court. Since his retirement from the immigration bench, Judge Schmidt has remained interested and involved in immigration law generally, with an emphasis on issues related to immigration courts and adjudication. He serves as an Adjunct Professor of Law at Georgetown, working on immigration-related issues, and is an officer or member of multiple organizations with a focus on immigration law and administration. He writes to share his knowledge and perspective with the Court, in the hope that his insights into the realities of immigration-court litigation will genuinely assist the Court in reaching its decision in this case.

SUMMARY OF ARGUMENT

As further explained below, the immigration authorities once had a system for providing complete and statutorily compliant Notices to Appear, they should have such a system, and they could and likely would

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioner and respondent have consented to the filing of this brief.

create such a system were this Court to encourage that result by deeming their existing practice insufficient to trigger the stop-time rule.

ARGUMENT

Providing notices to appear that comply with Section 1229(a)(1) is both feasible and desirable from the standpoint of the efficient administration of the immigration system.

Judge Schmidt had extensive experience with the immigration court system. From February 1995 to March 2001, he was Chairman of the Board of Immigration Appeals (BIA). From 2001 to 2003, he continued to serve as a Member of the BIA. Thereafter, he was appointed as an Immigration Judge (IJ) in April 2003, and he served for the next thirteen years as a United States Immigration Judge at the United States Immigration Court in Arlington, Virginia. In both capacities, he adjudicated tens of thousands of cases and became thoroughly familiar with the procedures and on-the-ground systems and practices that the immigration authorities and courts used to process cases. But it was on-the-ground experience as an IJ in Arlington that left him best informed about how the system actually works, as well as its current bureaucratic shortcomings.

One overarching design issue for the system is that the Department of Homeland Security (DHS) and the Immigration Court system are different agencies and have different roles in this system, with a somewhat haphazard division of responsibilities between them. The Immigration Court is housed within the Department of Justice and governed by the Executive Office for Immigration Review (EOIR) rather than

DHS. And under current regulations, it is DHS (rather than the Immigration Court) that commences a removal case by serving a Notice to Appear (NTA) on the foreign national "respondent" and filing that notice with the Immigration Court. DHS has the active role (serving NTAs on those against whom it wishes to institute removal proceedings and filing cases), while the Immigration Court has a passive role in this system (receiving and docketing these notices as part of its case-initiation process). And depending on how the system is administered, respondents very well might know that DHS has started a case against them before the Immigration Court knows it, let alone gets that case onto its calendar.

In fact, under current regulations and procedures, the Immigration Court does not actually take jurisdiction over a removal case until the NTA is "filed" with the Immigration Court by DHS and entered into the Immigration Court's computerized docket system—and that can take a while. A Docket Clerk of the Immigration Court performs the latter action *by hand*. Because of the heavy workloads at both DHS and the Immigration Court, there often are substantial delays between the date on which an NTA is served and the date it appears on the Immigration Court's computerized docket and thus is considered "filed" with the Immigration Court. And during that period of governmental delay, the NTA is essentially in No Man's Land: Nothing can be scheduled or docketed in the meantime. Indeed, because the case does not yet appear on the Immigration Court's docket, any legal papers—including Change of Address forms—filed with the Immigration Court during this period cannot be matched with a physical Record of Proceeding ("ROP").

And Judge Schmidt's experience was that documents that were not immediately posted to the ROP were frequently lost and not readily retrievable.

The NTA informs the respondent of a number of important things they need to know if the system is to run smoothly and they are to have a fair chance to defend their immigration case. These include: (1) the nature of the legal charges DHS is bringing; (2) the date, time, address, and courtroom at which the respondent must appear to defend those charges; and (3) various warnings, including the right to obtain counsel at no expense to the Government, the obligation to report changes in address to the Immigration Court, and the consequences of a failure to appear for any removal hearing. Because there is currently no "e-filing" system in Immigration Court, however, the Court Clerk must manually enter all data—*including* the relevant data from the NTA—into the Immigration Court's internal docket system if it is to match the information that the respondent has been given. And given the volume of cases, time pressures, and periodic staffing shortages, data entry errors are common and provide another reason why scheduling and accurate docketing of important documents (including mailing addresses) can be delayed or confused. This would, for fairly obvious reasons, work much more smoothly and error-free if the information was determined by or entered into the Immigration Court's computer system before a notice with that information was sent out to the respondent.

Relatedly, and most important for present purposes, this seemingly backwards and byzantine approach to the immigration bureaucracy can make trou-

ble when it comes to routine scheduling and other matters. That is because scheduling and administration ultimately depends in large part on the Immigration Court, while responsibility for notifying the respondent of these details lies with DHS in the first instance. This design flaw has, in part, given rise to this case.

Given that the government's current regulations and practices make DHS responsible for serving the NTA—while the Immigration Court schedules the removal hearing dockets whenever the information from that NTA is *later* manually (and accurately?) entered into the docket system— DHS does not know the time, date, and courtroom for the hearing without some interaction with the Immigration Court. There are two ways to fix this problem. One would be to correct the obvious design flaw that makes it difficult to provide a complete, correct and statutorily-compliant notice (while also introducing many of the other errors described above). The other, which the government has chosen, is for DHS to serve NTAs with the notation that the time, date, and courtroom for the hearing are "to be determined" ("TBD") by the Immigration Court.

Putting aside due process and other concerns with this kind of "notice," as well as the obvious tension between such notice and the requirements of 8 U.S.C. § 1229(a)(1), this turns out to be a suboptimal approach from a purely bureaucratic perspective. "TBD" cases insert another step in the system, wherein the Immigration Court Clerk's office must send out by regular U.S. Mail a written Notice of Hearing ("NOH") scheduling the initial Master Calendar Hearing before the Immigration Court. These hearings are, essentially, the immigration system's version of an initial arraignment, and so it is critical that the respondent

be accurately informed about where they need to be, when they need to be there, why they are coming, and what will happen if they don't show up. But (as mentioned above), the Immigration Court Clerk's office is already buried in a host of tasks that require manual data-entry, and so this extra step introduces the potential for further delay, further data-entry errors, and problems with regular U.S. Mail delivery.

Simply put, in Judge Schmidt's experience, using TBD notices increased the potential for defective notices, which tended to result, in turn, "in absentia Removal Orders" that are later challenged, while only adding to the work of an overburdened Clerk's office. TBD notices thereby introduced more delay and inaccuracy into the system, and resulted with some frequency in procedurally unfair results as well.

To address the foregoing difficulties, however, EOIR and DHS did eventually work together to develop something called the "Interactive Scheduling System" ("ISS"). The ISS enabled the offices at DHS with authority to issue NTAs to have direct access to a computerized list of "available" Master Calendar dates at the various local Immigration Courts. This, in turn, allowed DHS to specify an exact date, time, and courtroom for the Master Calendar in the NTA, while also marking that date as now occupied by the new case. This was, for obvious reasons, a much better way to run the railroad.

When Judge Schmidt arrived at the Arlington Immigration Court in April 2003, many of the cases on his Master Calendar were scheduled through the ISS and, therefore, had the exact time, date, and courtroom specified on the NTA. Other Initial Master Calendar hearings were TBD, however, meaning that the

hearing had been scheduled by the Immigration Court Clerk's office sending out an NOH, rather than by the NTA. Unsurprisingly, the former cases tended to proceed much more smoothly than the latter.

This system did not deprive IJs like Judge Schmidt over any control they would have otherwise had over their Master Calendars. That is because Judge Schmidt and other IJs had neither input nor control over the scheduling of their Master Calendar hearings in the first place. That function was assigned to the Court Administrator who worked directly for an Assistant Chief Immigration Judge at EOIR Headquarters in Falls Church, Virginia. That Court Administrator did not work for the IJs who actually heard cases at the Arlington Immigration Court, and was not responsive to their individualized or systemic concerns.

As Judge Schmidt's time at the Arlington Immigration Court progressed, and his docket grew, he observed that the number of initial Master Calendar cases scheduled through the ISS diminished in relation to the number of initial Master Calendars scheduled on a TBD basis using the NOH. He does not know exactly why. On its face, this unfortunate development seemed correlated to an increase in caseload, changing priorities implemented by EOIR Headquarters, and staffing shortages among the Immigration Court clerks. But the effect of ISS's increasing obsolescence was ironic from these standpoints, because more fully implementing such a system would have helped to smooth operations, limit errors, and reduce the workload in the Clerk's office. It would be a good thing if the agencies involved had a reason to bring it back and make it work.

Judge Schmidt is not aware of the current status of the ISS or whether it still operates at all. But he is confident that there are no technical or legal barriers that would foreclose development of an ISS capable of providing exact initial Master Calendar hearing dates and information for all or nearly all NTAs issued by DHS. Creating such a system would make things *easier*, not harder, on the Immigration Court's Clerk's office, would reduce the manual data-entry workload on that office, would reduce data-entry and mailing errors, would immediately establish a docket under which a Change of Address or other early-filed form could be accurately filed, and would also (of course) limit the real risk of procedurally unfair results. Judge Schmidt's frank impression was that this was the kind of system any private-sector bureaucracy would have implemented long ago *for its own sake*.

To put a fine point on it, including time-and-place information in the NTA is not only what the statute requires, but it would also be in *everyone's* interest to have a system for doing so: It would help not only the respondents who deserve immediate, accurate, and complete notice in their NTAs, but the IJs, clerks, Court Administrators, Assistant Chief Immigration Judges, DHS officials, BIA members, and EOIR officials who toil away in this system. And that is not to mention the taxpayers, who actually fund this system and expect DHS and the Immigration Court to produce reasonably fair, accurate, and timely results.

CONCLUSION

Amicus Judge Schmidt respectfully submits that the decision below should be reversed. If DHS wants its initial notice to trigger the stop-time rule, it should work with the Immigration Courts to solve the readily solvable problem of scheduling Master Calendar hearings before NTAs are served.

Respectfully submitted,

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